MICHIGAN SUPREME COURT

Office of Public Information

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SUPREME COURT TO HEAR ENVIRONMENTAL CASE; ABILITY TO SUE UNDER MICHIGAN ENVIRONMENTAL PROTECTION ACT AT ISSUE

LANSING, MI, January 9, 2004 – Environmental advocacy groups challenging a decision by the Michigan Department of Environmental Quality (DEQ) will get a hearing before the Michigan Supreme Court next week as part of the Court's January oral arguments schedule.

In *National Wildlife Federation v. Cleveland Cliffs Iron Company*, the plaintiffs sued the DEQ and a mining company after the DEQ granted a permit for the company to expand an iron mine in Marquette County. The plaintiffs contend that the permit puts wetlands and streams in the area at risk, violating the Michigan Environmental Protection Act (MEPA). The mining company argues that the suit should be dismissed because the plaintiffs lack a personal stake in the lawsuit and have not shown that they would be directly harmed by the mining company's activities. The plaintiffs cite a provision in MEPA that purports to give "any person" standing to bring suit.

Also before the Court is *Radzinski v. Doe*, in which a woman who was tried – and acquitted – of criminal sexual conduct now seeks to sue her accusers, saying that they fabricated the allegations to get revenge against her and her husband. At issue is whether the plaintiff can maintain her claims for intentional infliction of emotional distress and malicious prosecution. The defendants argue in part that a prosecutor's decision to pursue their allegations, following a detective's investigation, shields them from liability.

The Court will also hear *Phillips v. MIRAC*, in which the plaintiff challenges a $20,000 cap on a rental car company's liability for the death of a person riding in one of its vehicles. The cap, which is imposed by the Michigan Vehicle Code, is unconstitutional because it interferes with the right to have a jury determine the amount of damages, the plaintiff argues. The plaintiff also contends that the damage cap violates a party's constitutional right to due process and equal protection of law.

In a fourth case, *American Alternative Insurance Company, Inc., v. Farmers Insurance Exchange*, the Court will consider whether the defendant, who decided to drive himself home after several hours of drinking, should be subject to a reimbursement claim by the plaintiff insurance company. The defendant collided with an ambulance insured by the plaintiff; one of the patients in the ambulance was killed in the crash. The defendant argues that the state's no-fault law shields him from liability for acts that are not "intentional," while the insurance company contends that the defendant's "willful and wanton" behavior amounts to intentional conduct.

The Court will hear eight other cases, involving criminal, medical malpractice, negligence, contract, statutory construction, and jurisdictional issues.

Court will be held on **January 13, 14, and 15.** Court will convene at **9:30 a.m.** each day.

(*Please note: The summaries that follow are brief accounts of complicated cases and might not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. For further details about these cases, please contact the attorneys. Briefs in these cases may be viewed on the Michigan Supreme Court's website at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm.)

Tuesday, January 13
Morning session

PEOPLE v. KIMBLE (case no. 122271)
Prosecuting attorney: Janet A. Napp/(313) 224-5741
Attorney for defendant Richard A. Kimble: Craig A. Daly/(313) 963-1455
Trial court/judge: Wayne County Circuit Court/Hon. Diane M. Hathaway
At issue: The defendant was given sentencing points on a guideline variable that did not apply to his crime. At sentencing, however, defense counsel objected only to the number of points, not the scoring of the variable.
Background: Richard Kimble shot and killed Monique Trotty in an attempt to steal the wheel rims from her fiancé's car, which she was driving accompanied by her finance and the couple's one-year-old son. The Wayne County prosecutor charged Kimble with felony murder, carjacking and felony firearm. Kimble waived a jury trial; a judge found him guilty of second-degree murder and felony firearm. The judge stated that she had reasonable doubt about whether Kimble had committed carjacking. She sentenced Kimble to 30 to 70 years in prison for second-degree murder and a consecutive 2-year term for felony firearm. Kimble appealed, contending in part that the trial judge erred in scoring certain offense variables (OV) contained in legislative sentencing guidelines. He contended that the court incorrectly scored OV 9 at 10 points. The sentencing statute provides that a trial judge must assign 10 points to OV 9 if the crime involves two to nine victims. Kimble also argued that the judge erred by assigning OV 10 at 15 points for "predatory conduct." Finally, Kimble asserted that the judge wrongly assigned five points for OV 16; OV 16 applies to home invasions, not murder convictions, Kimble maintained. Because of these alleged errors, Kimble stated, his sentence was substantially longer than it should have been. In a published opinion, a majority of the Court of Appeals affirmed Kimble's convictions, but remanded the case for resentencing, finding that the application of OV 16 was "plain legal error." Both Kimble and the prosecution appeal. The prosecution argues that Kimble waived his challenge to the application of OV 16 by not raising the issue at sentencing.

BRYANT v. OAKPOINTE VILLA NURSING CENTRE (case no. 121723-24)
Attorneys for plaintiff Denise Bryant, Personal Representative of the Estate of Catherine Hunt, Deceased: Mark Granzotto/(248) 546-4649, Jules B. Olsman/(248) 591-2300

Attorneys for defendant Oakpointe Villa Nursing Centre: Susan Healy Zitterman/(313) 965-7905, Carol Holmes/(248) 814-9004
Trial court/judge: Wayne County Circuit Court/Hon. John A. Murphy
At issue: A patient in a nursing home suffocated and died when her neck got caught between the raised rails of her bed and the mattress. Her estate, which sued the nursing home, claimed that an aide used the wrong-sized mattress for the patient's medically prescribed bed. Is the claim one of medical malpractice or ordinary negligence?
Background: Catherine Hunt, a resident of Oakpointe Villa Nursing Center, died of asphyxiation after her neck got caught between the raised rails of her bed and the mattress. Denise Bryant, as personal representative of Hunt's estate, sued Oakpointe for negligent conduct. Oakpointe moved to dismiss the case, arguing that the plaintiff's claim was for medical malpractice. According, the estate was required by Michigan law to give six months' notice before filing suit and to submit an affidavit of merit, Oakpointe argued. The circuit court judge denied Oakpointe's motion, indicating that the claim was one for ordinary negligence "at this point." The estate later filed an amended complaint, alleging in part that Oakpointe owed Hunt the duty to assure that Oakpointe's employees were "properly trained regarding dangers posed to nursing home residents by bed rails and positional asphyxia." The estate's amended complaint contended that the employees were not properly trained and that Oakpointe failed to "assess the risk of positional asphyxia" and assure that Hunt was "provided with an accident-free environment." Oakpointe brought a second motion to dismiss, arguing that the estate's claim was in fact one for medical malpractice. The circuit court judge granted Oakpointe's motion and dismissed the case without prejudice. The judge found that the estate's allegations involved the exercise of professional judgment and therefore had to be viewed as a medical malpractice claim. The estate filed a new law suit, alleging medical malpractice. Oakpointe moved to dismiss the second suit, arguing that the statute of limitations for a medical malpractice claim had expired. The judge denied the motion, finding that the estate's first lawsuit stopped the statute of limitations from running. The Court of Appeals reversed in a 2-1 unpublished per curiam opinion. The majority found that the estate's claim was not one of medical malpractice because the main issue was not medical judgment, but improper custodial care, a matter of ordinary negligence. As to the statute of limitations for the estate's later medical malpractice action, the court ruled that the filing of a complaint without an affidavit of merit does not toll the period of limitations, and that the trial judge therefore erred in not dismissing the medical malpractice case, the majority said. Oakpointe appeals on the issue of whether the estate's claim is for medical malpractice.

LAWRENCE v. BATTLE CREEK HEALTH SYSTEMS (case no. 122215)
Attorneys for plaintiff Mildred L. Lawrence, Personal Representative of the Estate of Lloyd C. Ginger, Deceased: Mark Granzotto/(248) 546-4649, John M. Jereck/(269) 964-3754
Attorneys for defendant Battle Creek Health Systems: Michael L. Van Erp, Robert M. Wyngaarden /(517) 349-3200
Trial court/judge: Calhoun County Circuit Court/Hon. Stephen B. Miller
At issue: After undergoing a series of x-rays, the plaintiff's decedent suffered a fractured hip when he fell while attempting to get down from the examination table. Can he bring an action for ordinary negligence, or is this case one of malpractice?
Background: Eighty-seven-year-old Lloyd C. Ginger suffered a fractured hip when he fell from an examining table after having a series of x-rays taken at the Battle Creek Health Care System

Radiology Department. He sued Battle Creek Health Care System (BCHCS), alleging in part that the radiology technician was negligent in not helping Ginger get off the table. A jury returned a verdict in Ginger's favor, finding that the technician was responsible for the fall. Both before and after the trial, BCHCS filed motions claiming that Ginger's case was not properly before the court. Because the alleged negligence took place in the context of a professional relationship, Ginger's claim was really one of medical malpractice, not negligence, BCHCS argued. As a result, Ginger was required to provide an expert's testimony on the standard of care for a radiology technician, BCHCS contended. Ginger argued that the injury was not in the course of medical treatment and that the jurors could draw upon their own experience and knowledge to determine whether the technician was negligent. The trial judge denied BCHCS's motions. In an unpublished per curiam opinion, the Court of Appeals affirmed the lower court's ruling. BCHCS appeals.

PHILLIPS v. MIRAC, INC. (case no. 121831)
Attorney for plaintiff Margaret Phillips, Personal Representative of the Estate of Regeana Diane Hervey, Deceased: Nicholas R. Trogan, III/(989) 781-2060
Attorneys for defendant MIRAC, Inc.: Ernest R. Bazzana, Hans H.J. Pijls/(313) 965-3900
Attorneys for amicus curiae Michigan State Medical Society: Richard D. Weber, Joanne Geha Swanson/(313) 961-0200
Attorneys for amicus curiae American Tort Reform Association: F.R. Damm, Paul C. Smith/(313) 965-8300
Trial court/judge: Saginaw County Circuit Court/Hon. Leopold P. Borrello
At issue: A state law limits the amount of damages a plaintiff may obtain from a rental car company. Is the statute constitutional? Does it violate a litigant's right to a jury trial, equal protection, or due process of law?
Background: Regeana Hervey was a passenger in a rental car driven by Da-Fel Reed; Reed lost control of the car and Hervey was killed. Reed had rented the car for less than 30 days from MIRAC, which does business as Enterprise Rent-A-Car. Hervey's estate sued MIRAC under section 401 of the Michigan Vehicle Code (MCL 257.401). The statute provides in part that "Unless the lessor, or his or her agent, was negligent in the leasing of the motor vehicle, the lessor's liability under this subsection is limited to $20,000 because of bodily injury to or death of 1 person in any 1 accident and $40,000 because of bodily injury to or death of 2 or more persons in any 1 accident." The estate did not claim that MIRAC was negligent in leasing the automobile to Reed. A jury returned a $900,000 verdict in favor of the estate. Before trial, however, the parties had entered into a "high-low" agreement, limiting damages to the range of $150,000 to $250,000, but recognizing that the statutory $20,000 cap might apply. After the jury rendered its verdict, both parties moved for entry of judgment; the estate requested a judgment of $250,000, while MIRAC moved for a judgment in the amount of $20,000. The trial judge ruled in the estate's favor, finding that the damage cap in MCL 257.401 violated the constitutional right to a jury trial, because the cap eliminated the right to have a jury determine the amount of damages. The judge also found that the damage cap in MCL 257.401(3) violated a party's constitutional right to due process and equal protection of law. In a published opinion, the Court of Appeals reversed. A majority of the panel found that the damage cap did not violate the constitutional guarantee of a jury trial, equal protection, or due process. The Court of Appeals accordingly reversed and remanded the case for a judgment consistent with the damage cap. The

dissenting judge argued that the damage cap violated the right to a jury trial, because that right "extends to a determination of damages." The estate appeals.

Afternoon session

NATIONAL WILDLIFE FEDERATION AND UPPER PENINSULA ENVIRONMENTAL COALITION v. CLEVELAND CLIFFS IRON COMPANY AND EMPIRE IRON MINING PARTNERSHIP, ET AL. (case no. 121890)
Attorneys for plaintiffs National Wildlife Federation and Upper Peninsula Environmental Coalition: F. Michelle Halley/(906) 361-0520, Neil S. Kagan/(734) 769-3351
Attorneys for defendants Cleveland Cliffs Iron Company and Empire Iron Mining Partnership: Mary Massaron Ross, Karl A. Weber/(313) 983-4801
Attorney for defendants Michigan Department of Environmental Quality and Russell J. Harding: Harold J. Martin/(906) 786-0169
Attorney for amicus curiae Camp Quality Michigan: John F. Rohe/(231) 347-7327
Attorney for amicus curiae Joseph L. Sax: Joseph L. Sax/(415) 346-6221
Attorney for amicus curiae Tip of the Mitt Watershed Council: Ellen J. Kohler/(231) 883-1812
Attorneys for amicus curiae William G. Milliken, League of Women Voters, et al.: James M. Olson, Scott W. Howard/(231) 946-0044
Trial court/judge: Marquette County Circuit Court/Hon. Garfield W. Hood
At issue: The plaintiffs challenged a permit issued to corporate defendants by the Department of Environmental Quality, claiming that the defendants' intended activities would violate the Michigan Environmental Protection Act. The statute purports to give "any person" standing to bring suit. Does the statute give standing to the plaintiffs, or must they also show that they have a personal stake in the lawsuit's outcome?
Background: Cleveland Cliffs Iron Company and Empire Iron Mining Partnership own the Empire Mine, an iron ore mine located in Marquette County. The Empire Mine owners applied to the Michigan Department of Environmental Quality (DEQ) for a permit to expand the mine. The expansion would include filling in some wetlands and streams with mining waste. Ultimately, the DEQ issued the required permits. The National Wildlife Federation and the Upper Peninsula Environmental Coalition sued the Empire Mine owners and the DEQ under the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq*. The plaintiffs argued that granting the permit would cause pollution, impairment, or destruction of natural resources. The circuit court dismissed the case, stating that the plaintiffs lacked standing to bring the suit because they do not have a personal stake in the outcome of the lawsuit and had not demonstrated that they would be injured directly. The Court of Appeals reversed in an unpublished per curiam opinion. The plaintiffs had standing under MEPA, the Court of Appeals ruled, under Section 1701(1) of MEPA, which provides: "The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." The Empire Mine owners appeal. The DEQ agrees with the plaintiffs that MEPA gives them standing to bring the lawsuit.

RADZINSKI v. DOE (case no. 122522)
Attorney for plaintiff Mee Sook Radzinski, a/k/a Sue Radzinski: Neil H. Fink/(248) 258-3181
Attorney for defendants John Doe/Jane Roe as Personal Representative of Jennifer Carlson, a Minor, Nancy Lee Carlson, and Eric Steven Carlson: John P. Nicolucci/(517) 371-8224
Trial court/judge: Oakland County Circuit Court/Hon. Gene Schnelz
At issue: The defendants accused the plaintiff of sexual misconduct. A criminal trial resulted in an acquittal, and the plaintiff filed a civil suit against her accusers. Does Michigan have the tort of intentional infliction of emotional distress? If so, are its elements present in this case? Are the elements of malicious prosecution present in this case?
Background: Mee Sook ("Sue") Radzinski claims that Nancy and Eric Carlson, and their daughter Jennifer, fabricated a sexual assault claim against Radzinski to get revenge for Radzinski's husband having fired Nancy Carlson. After she was fired, Nancy Carlson told a social worker that Radzinski sexually assaulted Jennifer and Nancy Carlson's sister. The matter was referred to the Oakland County office of the Family Independence Agency, which in turn referred the Carlsons to the Oakland County Sheriff's Department. A detective in the sheriff's department investigated and presented the gathered information to the Oakland prosecutor's office, which ultimately authorized a warrant for Radzinski's arrest. She was charged and bound over for trial. A jury found Radzinski not guilty of criminal sexual conduct in the fourth degree, the charge that she had assaulted Jennifer. Radzinski then accepted a plea bargain to the remaining charge regarding Nancy Carlson's sister and pled no contest to a "disorderly person" charge. The judge assigned to that case commented to the prosecutor, "I've got to tell you, if you would have tried this case in front of me, I would have dismissed it. I think this was the biggest crock of baloney that I have ever heard in my life. The case against you was a bit of trash."

Radzinski later filed a civil suit against the Carlsons for having made false allegations against her. Her suit included claims for malicious prosecution and intentional infliction of emotional distress. The Carlsons moved to dismiss the case and the trial court granted their motion. The Court of Appeals affirmed in an unpublished decision. Radzinski "failed to demonstrate a genuine issue of material fact regarding her claim of malicious prosecution," the Court of Appeals said, because "there is no evidence that the prosecution was initiated other than at the sole discretion of the prosecutor, based on an independent investigation…." The Court of Appeals also upheld the dismissal of Radzinski's claim for intentional infliction of emotional distress, saying that the Carlsons' actions "do not meet the standards [for an emotional distress claim], and plaintiff has otherwise failed to present any evidence of extreme and outrageous conduct sufficient to sustain her claim." Radzinski appeals.

Wednesday, January 14
Morning session

HIGHLAND-HOWELL DEVELOPMENT COMPANY, L.L.C. v. TOWNSHIP OF MARION (case no. 122843)
Attorney for plaintiff Highland-Howell Development Company, L.L.C.: Richard Bisio/(248) 740-5698
Attorney for defendant Township of Marion: Neil H. Goodman/(248) 988-5880
Trial court/judge: Livingston County Circuit Court/Hon. Stanley J. Latreille

At issue: Plaintiff development company claims that defendant township promised to construct a sewer line on the plaintiff's property; the promises were allegedly part of the township's creation of special assessment districts. Does the Michigan Tax Tribunal have exclusive jurisdiction over the company's claims?

Background: The Township of Marion designated two sanitary sewer districts, which included parcels owned by Highland-Howell Development Company, a developer of manufactured home parks. The township levied special assessments on property in the districts, with the goal of using the revenues to install sewer improvements in those districts. Highland-Howell received a special assessment of $3.2 million and a tax bill for the first installment. Highland-Howell filed a petition with the Michigan Tax Tribunal (MTT) contesting the special assessment; one of its claims was that the township breached a promise to make an improvement that was not part of the final special assessment district. The company also filed a complaint in circuit court, making the same basic allegations as in its MTT petition, but also seeking injunctive relief from the special assessment. The township moved to dismiss the circuit court suit under Section 31 of the Michigan Tax Tribunal Act, which states in part that the MTT's "exclusive and original jurisdiction shall be: "(a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws. (b) A proceeding for refund or redetermination of a tax under the property tax laws." Under the statute, the MTT had exclusive jurisdiction over the matter, the township argued. The circuit court judge dismissed the suit, but the Court of Appeals reversed in an unpublished per curiam opinion. Highland-Howell's breach of promise claim was not within the MTT's exclusive jurisdiction, the Court of Appeals said. The township appeals.

MANN v. ST. CLAIR COUNTY ROAD COMMISSION (case no. 122845)

Attorneys for plaintiff Patrick Mann, Sr., and Gaye Mann, Individually and as Next Friend of Patrick Mann, Jr., a Minor: David M. Moss/(248) 945-0100, Patrick Burkett/(248) 355-0300

Attorneys for defendant St. Clair County Road Commission: Jon D. Vander Ploeg, William L. Henn/(616) 774-8000

Trial court/judge: St. Clair County Circuit Court/Hon. Peter E. Deegan

At issue: The Michigan Motor Vehicle Code imposes a five percent cap on a plaintiff's comparative negligence for failing to wear a safety belt. Does that cap apply where the plaintiffs brought their suit under the highway exception to governmental immunity?

Background: Patrick Mann, Sr., and his son, Patrick Mann, Jr., were seriously injured when their car struck a tree. Mann and his wife sued the St. Clair County Road Commission for failing to reasonably maintain the highway; they claimed that Mann lost control of the car due to a defect in the shoulder of the road. The Manns brought their suit under a provision of the state's governmental immunity statute, which permits suits against governmental entities for failure to maintain roads. The Commission contended that the Manns' injuries were largely due to their failure to wear their seatbelts. The Commission moved for a ruling that the five percent cap on comparative negligence does not apply in this case. Under the Michigan Motor Vehicle Code, the percentage of fault for an injured person who fails to wear a seat belt is capped at 5 percent. The Commission argued that the Motor Vehicle Code cap should not apply to a highway defect case brought under the governmental immunity statute and that the Manns could be found to be more than 5 percent at fault. The circuit judge denied the motion. In a published opinion, a

majority of the Court of Appeals affirmed. The majority found that one of the goals of the Motor Vehicle Code was ensuring highway maintenance. Therefore, the statutory cap on comparative negligence found in the Motor Vehicle Code also applied in a highway defect case brought under the governmental immunity statute, the majority concluded. The Commission appeals.

PEOPLE v. LIVELY (case no. 123145)
Prosecuting attorney: William E. Molner/(517) 373-4875
Attorney for defendant Tiffany F. Lively: Earl R. Spuhler/(989) 734-2564
Trial court/judge: Presque Isle County Circuit Court/Hon. Joseph P. Swallow
At issue: Is the issue of whether false testimony was "material" and will support a perjury conviction a question of law for the court or a question of fact for the jury?
Background: Tiffany F. Lively was a defendant in a divorce suit. A judgment of divorce was entered against her by default. Lively then moved to set aside the default, testifying that she did not know that a divorce had been filed and that she was never served with the complaint. A process server testified that he served Lively with the complaint. The judge set the divorce aside, stating, "Listening to it all, it sounds to me like the mother ought to have known there was a divorce going on, but I'm not convinced. So, at any rate, we'll set it aside." After the default was set aside, Lively was charged with perjury at the request of her husband's divorce attorney. Her attorney moved to have the charges dismissed, claiming that her testimony regarding service of process was not "material" – in other words, did not affect the outcome of the court's decision to set aside the default -- and therefore could not be the basis for a perjury conviction. The judge denied the motion. A jury found Lively guilty of perjury, and she was sentenced to two years probation and 50 hours community service. In a published opinion, the Court of Appeals reversed her conviction and remanded the case for a new trial. A defendant can be convicted of a crime only if a jury finds guilt as to each element of the crime beyond a reasonable doubt, the Court of Appeals noted. Materiality is an element of the crime of perjury, the Court of Appeals found, so the trial court erred by deciding that her testimony was material. The prosecution appeals.

Afternoon session (Court resumes at 2:30 p.m.)

DYER v. TRACHTMAN (case no. 123590)
Attorney for plaintiff Marquis Dyer: Robert J. Dinges/(313) 963-1500
Attorney for defendant Edward P. Trachtman, D.O.: Amy E. Schlotterer, Paul J. Manion/(313) 965-6100
Attorney for amicus curiae Michigan Self-Insurers' Association: Martin L. Critchell/(313) 961-8690
Trial court/judge: Oakland County Circuit Court/Hon. Denise Langford-Morris
At issue: The plaintiff brought a malpractice suit against a physician to whom he was sent for an independent medical exam. The trial court dismissed the case, finding that there was no physician-patient relationship. Can the plaintiff maintain his medical malpractice suit against the doctor? Can the plaintiff proceed on an ordinary negligence claim?
Background: Marquis Dyer claimed that he was injured in an "altercation" with Detroit police. In the course of the ensuing lawsuit, the City of Detroit sent Dyer to Edward P. Trachtman, D.O. for an independent medical examination (IME). Dyer said that he told Trachtman that his right arm should not be elevated more than 45 degrees because Dyer had recently had surgery on his

right shoulder. According to Dyer, Trachtman grabbed Dyer's right arm and elevated it to 90 degrees, causing pain. Dyer claimed that, as a result of the doctor's action, he had to have a second operation on his shoulder. He sued Trachtman on several theories, including malpractice. Trachtman moved to dismiss the malpractice claim, arguing that he could not be held liable to Dyer for malpractice in the absence of a physician-patient relationship. Trachtman contended that the other counts in the lawsuit also lacked merit and were nothing more than restatements of the malpractice claim. The trial court dismissed the lawsuit and denied Dyer's motion to amend his complaint to add other claims, including ordinary and gross negligence. In a published decision, the Court of Appeals affirmed in part, agreeing with Trachtman and the trial court that a physician-patient relationship is a prerequisite for a professional negligence or malpractice cause of action against a physician. But Dyer could proceed against Trachtman on an ordinary negligence claim, based on the doctor's duty to conduct an IME in a manner that would not affirmatively cause physical harm to defendant during the examination. Trachtman appeals.

Thursday, January 15
Morning session only

KELLY-STEHNEY & ASSOCIATES, INC. v. MACDONALD'S INDUSTRIAL PRODUCTS, INC. (case no. 123118)
Attorneys for plaintiff Kelly-Stehney & Associates, Inc.: Michael J. O'Shaughnessy, Eric R. Bowden/(248) 645-9300
Attorneys for defendant MacDonald's Industrial Products, Inc.: David J. Gass, S. Grace Davis/(616) 831-1700
Trial court/judge: Oakland County Circuit Court/Hon. Rae Lee Chabot
At issue: The plaintiff, a sales representative firm, accepted an oral modification to the parties' commissions contract, violating the one-year rule of the statute of frauds. Later, the sale representative sought to enforce the original contract, citing the one-year rule. Is the sales representative barred from enforcing the original contract?
Background: Kelly-Stehney & Associates is a sales representative firm. MacDonald's Industrial Products is an automotive parts manufacturer. In 1994, Kelly-Stehney and MacDonald entered into a written agreement binding them for three years and providing for automatic one-year extensions thereafter. In 1997, the parties modified the terms of the written contract by a verbal agreement, which covered an additional three years. The parties followed through with this oral agreement, under which MacDonald paid, and Kelly-Stehney accepted, lower commissions than provided for in the written contract. MacDonald did not renew the contract, and Kelly-Stehney sued, seeking to have commissions paid at the higher rate set by the written contract. MacDonald moved to dismiss the case, arguing that Kelly-Stehney had waived any claim to commissions under the original written contract by entering into the oral agreement and accepting the reduced commissions. The trial judge dismissed the case and the Court of Appeals affirmed the trial court's ruling in a published opinion. Kelly-Stehney appeals, arguing that the oral agreement was invalid under the state's statute of frauds. The statute provides in part that, for an agreement that "by its terms, is not to be performed within 1 year from the making of the agreement," the agreement "is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise ..." MacDonald

argues that, despite the statute of frauds, Kelly-Stehney is still equitably estopped from enforcing the written contract.

AMERICAN ALTERNATIVE INSURANCE COMPANY, INC., et al., v. FARMERS INSURANCE EXCHANGE and YORK (case no. 121968)
Attorneys for plaintiffs American Alternative Insurance Company, Inc., and DVA Ambulance: Orlando L. Blanco, Maureen Milliron/(248) 519-9000
Attorney for defendant Donald Jeffrey York: William R. Schulz/(517) 371-8100
Trial court/judge: Shiawassee County Circuit Court/Hon. Gerald D. Lostracco
At issue: Following a bench trial, the plaintiff insurance company was awarded $61,000 in reimbursement for no-fault benefits which the company paid for damage the defendant caused to an ambulance.
Background: On December 23, 1997, Donald Jeffrey York was at a Christmas party, where he had been drinking alcohol for six or seven hours. Shortly before 10:00 p.m., York called his wife to pick him up because he was concerned about his ability to drive home. Before she arrived, York changed his mind and decided to drive home himself. On the way home, he ran a stop sign and collided with an ambulance that was carrying accident victims to a hospital; one of the patients was killed. The ambulance was owned and operated by a company insured by American Alternative Insurance Company. American paid its insured $61,000 for the damage to the ambulance and then sued York, seeking reimbursement. York moved to dismiss the lawsuit, arguing that he was immune from suit under Michigan's no-fault act. The statute provides in part that "[n]otwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle … is abolished except as to: (a) Intentionally caused harm to persons or property…." The trial court rejected York's argument, finding that his actions were "willful and wanton" and therefore amounted to intentional conduct for purposes of the statute. The Court of Appeals reversed in a published opinion. While York's conduct could be considered willful and wanton, it was not sufficient to show that he intentionally caused the damage, the Court of Appeals concluded. American appeals.

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